No. 09-779

Supreme Court, U.S.
MAR 16 2010
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In The

Supreme Court of the United States

ELMON WALTERS, ALIX PROVENCE, CHARLENE BLACKSHEAR, CEDRIC JORDAN and all others similarly situated,

Petitioners,

versus

AMERICAN COACH LINES OF MIAMI, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF

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LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The following is a list of all parties to the proceeding in the circuit and district courts whose judgment is sought to be reviewed, as well as a corporate disclosure statement as required by Rule 29.6.

Petitioners:

Barrett, Teddy

BellaFleur, Jean F.

Blackshear, Charlene

Brown, Richard Kevin

Burns, Bennie

Chambers, Gilbert

Chapman, Gwendolyn

D'Elia, Joseph

Dobson, Pashun

Ferrer, Richard

Fletcher, David

Harper, Dwayne

Hernandez, Ricardo Nunez

Jackson, Felicia

Jefferson, Melvin

Jordan, Cedric

Lee, Christopher

Lee, Rogers

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT – Continued

Legrand, Herve

Lewis, Rupert

McConico, Yvonne

Moran, Jome

Morejon, Israel

Moreno, Luis

Moreno, Ramon

Munoz, Francisco

Pedrozo, Scarllet

Price, Lloyd

Provence, Alix

Rosenthal, Brant

Roswess, Clifford

Saenz, Juan Carlos

Saunders, Dwayne

Sheffield, Buford

Sinclair, Charlie

Smith, Callisto

Valega, Oscar

Valera, Flor G.

Veliz, Carlos Eduardo

Walters, Elmon

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT – Continued

Yera, Felix

Zellner, Frederick

Counsel for Petitioners:

Robert Ader, Esq.

Elizabeth B. Hitt, Esq.

Law Offices of Robert Ader, P.A.

Respondent and Respondent's Affiliates:

ACL Leasing, LLC

America Charters, Ltd.

American Coach Lines of Atlanta, Inc.

American Coach Lines of Jacksonville, Inc.

American Coach Lines of Miami, Inc.

American Coach Lines of Orlando, Inc.

American Coach Lines, Inc.

B & A Charter Tours, Inc.

Coach Am Group Holdings, Corp.

Coach Am Holdings, Corp.

Coach America Group Holdings, LP

Coach America Group, Inc.

Coach America Holdings, Inc.

CUSA ASL, LLC

CUSA AT, LLC

CUSA AWC, LLC

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT – Continued

CUSA BCCAE, LLC

CUSA BESS, LLC

CUSA CC, LLC

CUSA Corporate Travel, LLC

CUSA CSS, LLC

CUSA EE, LLC

CUSA ELKO, LLC

CUSA ES, LLC

CUSA FL, LLC

CUSA FTT, LLC

CUSA GCBS, LLC

CUSA GCT, LLC

CUSA KBC, LLC

CUSA K-TCS, LLC

CUSA Leasing, LLC

CUSA PCSTC, LLC

CUSA PRTS, LLC

CUSA RAZ, LLC

CUSA Transit Services, LLC

CUSA, LLC

KBUS Holdings, LLC

Lakefront Lines, Inc.

Midnight Sun Tours, Inc.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT – Continued

Royal Tours of America, Inc.

Southern Coach Company

Southern Tours, Inc.

The McMahon Transportation Company

Tippett Travel, Inc.

Trykap Airport Services, Inc.

Trykap Transportation Management, Inc.

No publicly held corporation owns 10% or more of the stock of American Coach Lines of Miami, Inc.

Counsel for Respondent:

Michael W. Casey, III, Esq.

Richard D. Tuschman, Esq.

Kevin E. Vance, Esq.

Epstein, Becker & Green, P.C.

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POINT I

PETITIONERS HAVE DEMONSTRATED A COMPELLING REASON FOR GRANTING CERTIORARI

As its first "Point," Respondent American Coach Lines of Miami, Inc. ("ACLM"), maintains that there is no compelling reason, as contemplated by Rule 10 of the Rules of the Supreme Court, to grant certiorari review of the instant matter. As Respondent acknowledges, though, the reasons for granting review, as provided by Rule 10, are neither controlling, nor exhaustive.

Still, Petitioners have articulated a "Rule 10" compelling reason for this Court to exercise its power of discretionary review. Petitioners have clearly expressed that the practice of traveling beyond the plain language of statutes, in order to read into them language which expands their statutory reach, directly amounts to a *judicial* conferral of jurisdiction in disregard of Congress' express statutory limitation of same, and runs afoul of legions of Supreme Court precedent (as well as the separation of powers doctrine) admonishing against reading into otherwise clear statutes language which effectuates a change in statutory scope or meaning. *See, e.g., Lamie v. United States*, 540 U.S. 526, 538-39 (2004); *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Petitioners have further related that by judicially expanding the jurisdictional reach of the statutes at issue (specifically, 49 U.S.C. §§ 13501 and

13506(a)(8)(A)), courts, including the Eleventh Circuit, have, directly and concomitantly, broadened the FLSA's motor carrier exemption to deny drivers of purely local, in-state transportation their overtime pay, in breach of the unquestionable duty, prescribed by this Court, to construe exemptions to the FLSA narrowly and in favor of the right to overtime pay. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Tennessee Coal, Iron & Ry. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944).

Moreover, Petitioners have demonstrated that the questions relating to the statutory provisions at issue have never been, and should be, settled by this Court. In particular, this Honorable Court has never rendered an opinion as regards whether the courts may go beyond the plain jurisdictional purview of 49 U.S.C. § 13501 to find that the DOT has jurisdiction over transportation not otherwise enumerated therein for purposes of the FLSA's motor carrier exemption found under 29 U.S.C. § 213(b)(1). Likewise, this Court has never reached the issue (as it is one of first impression) as to whether, in light of its clear wording, 49 U.S.C. § 13506(a)(8)(A) exempts from DOT jurisdiction the purely localized ground transportation of airline passengers, and does not save to the DOT jurisdiction over safety-related issues regarding transportation incidental to air.

Petitioners respectfully contend that, to the extent that courts have engaged in interpretation of these statutes, which are incontrovertibly clear on their face, to read into them language which creates

federal regulatory jurisdiction over wholly in-state transportation – regulation more properly left to the states – the courts have done so in error, fundamentally compelling review by this, our Highest, Court.

POINT II

THE CIRCUIT COURT WAS INCORRECT INSOFAR AS IT ALLOWED JUDICIAL EXPANSION OF FEDERAL REGULATORY AUTHORITY WHERE CONGRESS HAD PLAINLY LEFT SUCH TO THE STATES

A. Prior Precedent of This Court Does Not Compel Reading Into 49 U.S.C. § 13501 DOT Jurisdiction Over Wholly Intrastate Transportation

Respondent argues that courts *should* look beyond the plain language of 49 U.S.C. § 13501 to read into the statute the term "interstate commerce" in order to create jurisdiction over wholly localized, in-State transportation which forms a part of "a practical continuity of movement" of passengers bound ultimately for out-of-state destinations. As authority for this proposition, Respondent cites to what it views as prior precedent of this Court on the issue. Contrary to Respondent's suggestion, this Court has *never* ruled that § 13501's jurisdictional scope encompasses transportation within "interstate commerce," or that, despite its language, the statute was really meant to create DOT jurisdiction over localized

transportation which is but a separate leg of a longer interstate journey.

As Petitioners explained, this Court's 1947 *Levinson* case[1] appears to be the pivotal decision underlying courts' present-day assumption that, notwithstanding the clear diction of current jurisdictional statute, it is still necessary to insert the term "interstate commerce" into § 13501 and interpret the term in order to define, and broaden, the contours of DOT jurisdiction, for purposes of the FLSA's motor carrier exemption to overtime pay. While Respondent claims that the now-obsolete jurisdictional statute considered in *Levinson* is not substantively different than the current jurisdictional scope set forth in § 13501, in fact, it is.

In 1947, the motor carrier exemption related that the FLSA's overtime provisions:

> shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act 1935 . . . .

29 U.S.C. § 213(b)(1). *Levinson*, 330 U.S. at 653, n.4. At the same time, section 204 of the MCA empowered the ICC to establish, *inter alia*, driver qualifications and maximum hours of service, for passenger

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[1] *Levinson v. Spector Motor Service*, 330 U.S. 649 (1947).

carriers. *Id.* at 652, n.1. Significantly, though, section 204 did not identify any specific statutory section denoting the types of transportation over which the ICC held jurisdiction, but rather related that its regulatory purview is granted, "as provided in this part." *Id.* The *Levinson* Court, therefore, had to look to other statutory provisions within that "part" to derive an understanding of the types of transportation over which the ICC held regulatory authority. As Judge Nygaard recognized, *Levinson* derived its use of the term "interstate commerce," as well as its understanding of the term, from its "then-existing statutory definition," which imparted that interstate commerce is:

> commerce between any place in a State and any place in another State . . . **whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.**

Packard v. Pittsburgh Transportation Co., 418 F.3d 246, 260 (3d Cir. 2005) (Nygaard, J., concurring) (quoting 49 U.S.C. § 303(a)(10) (1940); emphasis added).

Thus, while in the time of *Levinson*, the MCA statute provided ICC jurisdiction over in-State transportation which forms but a part of an "interstate" movement (transportation which moves wholly *or partly* by motor, rail or water), in contrast, the *current, controlling* version of the MCA statute, 49 U.S.C. § 13501, which inarguably provides the DOT its jurisdictional authority to prescribe driver qualification

and maximum hours of service, neither contains nor references any language providing jurisdiction over a leg of transportation which runs entirely within the boarders of a State.[2] Although Respondent deems the 1947 statutory language substantively similar to the present day jurisdictional statute, it is clearly not. 49 U.S.C. § 13501 does not contain *any* language referencing "interstate commerce."

Far from the "red herring" claimed by Respondent, Petitioners' argument that the Court not stray from, but employ, **the plain language** of the MCA's jurisdictional statute for purposes of defining the reach of the FLSA's motor carrier exemption is well-grounded, logical and consistent with our fundamental obligations to (1) avoid engaging in the interpretation of a statute clear on its face; (2) reject the insertion of language which changes the scope of a statute; and, (3) construe FLSA exemptions narrowly in order to effectuate the Act's remedial purpose and the broad-based social and economic goals of Congress. While it is true that the courts (and even the DOL) continue to read into 49 U.S.C. § 13501 a bestowal of federal DOT jurisdiction over purely local, in-State transportation, with *no* analysis concerning

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[2] To the extent that elsewhere in the MCA, there may exist other statutory sections that speak in terms of "interstate commerce", such is irrelevant to the issue of whether or not drivers of wholly intrastate transportation may be denied their overtime pay, where, in codifying the FLSA's motor carrier exemption, Congress intentionally referenced the DOT's power as provided by Title 49 U.S.C., section 31502 and, in turn, section 13501.

the propriety of doing so, this does not justify blind acceptance of the practice, nor does it provide a reason for this Court to deny review of the issue.

B. Under the Plain Terms of the "Incidental To Air" Statute, the DOT Has No Jurisdiction Over Respondent's Purely Localized Airport Shuttle Service

While Respondent insists that the *plain language* of 49 U.S.C. § 13506(a)(8)(A) somehow saves to the DOT jurisdiction over safety-related matters, Respondent points only to *legislative history* of now-obsolete statutes and DOT regulations stemming therefrom. Respectfully, it is beyond the sovereignty of the courts, as well as the administrative agencies charged with the enforcement of statutes, to read *back into* legislation language which was intentionally excised by the legislature in order to provide the DOT with jurisdiction specifically repudiated. The incidental-to-air statute remains clear on its face: "Neither the Secretary nor the Board" has jurisdiction over "transportation of passengers by motor vehicle incidental to transportation by aircraft." 49 U.S.C. § 13506(a)(8)(A).

C. Petitioners Do Not Ask This Court to Change or Overhaul the MCA, But Ask Only That The Court Apply the Statutes As Written

Petitioners do not ask this Court to amend the FLSA or the MCA. Nor do they ask the Court "to overrule long-standing Supreme Court decisions from the 1940's," as Respondent alarms. (Opposition at 14). To the contrary, Petitioners ask that the Court enforce the current, controlling version of the subject statutes (rather than the now-defunct version which drove *Levinson*) as written – without traveling beyond its plain language – particularly, where doing so will effectuate the humanitarian purpose of the FLSA. There is simply no justification for going beyond the plain contours of congressional mandates to create federal authority, over what has traditionally been a function of the states, in an effort to deny overtime pay for countless numbers of drivers of purely localized, wholly in-state transportation.

CONCLUSION

For the reasons advanced, Petitioners most respectfully ask the Supreme Court of the United States to grant review of this Petition.

Respectfully submitted,

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